**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

**JUAN TAJALLE**,

Plaintiff

vs.

**CITY OF SEATTLE, SEATTLE PUBLIC LIBRARY**, **OFFICER SAM 8**, a.k.a. **JOHN DOE #1**, and **JOHN DOE #2**,

Defendants

**No. C07-1509TSZ**

**RESPONSE TO DEFENDANTS MOTION TO DISMISS; ALTERNATIVE MOTION FOR CONTINUANCE**

The plaintiff seeks an order denying the defendants' motion for summary judgment and motion for dismissal for . In the alternative, the plaintiff moves for a continuance under FRCP 56(f) in order to allow the plaintiff to conduct further discovery.

**INTRODUCTION**

The plaintiff does not agree with the defendant's version of the case. The defendant claims that the plaintiff was ejected from the library for disruptive behavior. The plaintiff claims that he was ejected for criticizing the performance of the security guards in the performance their duties.

The defendants claim that the complaint does not allege a constitutional violation. The plaintiff contends that the complaint alleges facts that could be construed to support the causes of action alleged.

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## PLAINTIFF'S DISAGREEMENT WITH THE DEFENDANT'S "STATEMENT OF FACTS"

The plaintiff disagrees significantly with version of the events described by the defendants in their declarations. To begin with, the plaintiff is not "asian";, he is an American citizen of Porteguese Polynesian descent. On June 14th., 2006, he was on the first floor of the Seattle Public Library about to enter the elevator. He sneezed due to a sinusitis condition he has in his left nostril of his nose. He was diagnosed with this condition when he was in the military in 1965. At times this causes him to involuntarily sneeze. This happens quite often when he visits the Public library, which is due to unclean clothes worn by the homeless. It does not have anything to do with the nearness of security guards, as alleged by Adam Smith in his unsworn statement attached to his declaration. At this point the plaintiff noticed that the two security guards were laughing. It also became obvious that they were in the process of ejecting another patron who appeared to be homeless who was just sitting by one of the desks by the security guards and bothering no one. When they finally persuaded the patron to get out of the chair and leave, the plaintiff then walked over to their posts and quietly asked them what it was that they were laughing at. He felt the guards were acting unprofessionally towards the homeless person so he just said hi to this individual in a show of support for the guards inappropriate behavior towards him. Mr. Tajalle had been working as a volunteer for the homeless entities in downtown Seattle for 5 years and it had been his experience that police or security officers would let up on inappropriate behavior if they knew there was a supportive witness.

The plaintiff had quietly asked the security guards if they were laughing at him. At this point the one security guard known as Sam-8 got up out of his chair abruptly and gave the plaintiff a threatening response. The plaintiff responded by quietly stating that all he wanted to know was what they found to be funny. The other security guard raised his voice at the plaintiff warning him without cause that if he didn't become quiet that the plaintiff would be escorted out of the library. Without raising his voice, Mr. Tajalle again

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quietly asked the reason for their action. At this point both uniformed security guards exerted their authority ordering the plaintiff to leave. Mr. Tajalle quietly responded that he had done absolutely nothing to warrant an ejection. During the verbal exchange of questions as to whether the security guards had the right to eject the plaintiff for asking a question, one security guard became loud in demanding that the plaintiff leave the library or he could get barred for a time. One guard walked away from his post and told Mr. Tajalle to follow him out of the library. Mr. Tajalle complied and followed.

The guard escorting the plaintiff out of the library was heading towards the large revolving door which served both exit and entrance functions and as he entered one space, the plaintiff tried to warn him that the plaintiff could not exit out of that revolving door and that he usually used the disabled persons door where at the push of an actuator button, the door would open electronically. The guard ignored his protest by insisting that Mr. Tajalle immediately follow him out through the door, hurriedly and forcefully entered causing the revolving door to gain momentum. The plaintiff then tried to enter to comply with the officer’s order. As he attempted to enter the revolving door, he got wedged between one edge of one stall and the partition as a result of the guard's excessive speed and force in pushing the swinging door to get him out. He fell on his right shoulder and the impact caused excruciating pain. The officer did not fall. At the time the plaintiff was wearing a biomedical device called a "Tens Unit" that was issued to him by the VA hospital to alleviate joint pain. It was prescribed for him along with pain medication for the bad right shoulder and he has to wear this so he can function throughout the day. The impact of the swinging door on his right shoulder displaced the wires connected to his shoulder and the battery got loose rendering the device useless to him. The pain caused his blood pressure to shoot sky high. All of this excitement caused him to drop his back pack with his blood pressure medication in it. He was reaching over to get at his medication when the guard kicked the back pack away from his reach. The plaintiff begged him to let him get at his

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medication for his pains yet the guard just stood there and looked down at the plaintiff. He then asked the plaintiff if he should call 911 for help. The plaintiff kept trying to reach at his backpack for his medication when the guard finally placed his foot between the plaintiff's hand and the backpack. At that point, the plaintiff's head started spinning and he became nauseous and starting to pass out from the pain. He kept telling the officer he needed his medicine quickly, but the security officer would not help.

The plaintiff explained to one attending fireman that he needed his heart medication which was in his backpack as the fireman had taken his blood pressure and found that it was reading 200/124. This coupled with the fact the plaintiff is a diabetic, momentarily caused him to black out. As this was occurring, he could recall Sam 8 acting panicky.

The fire department then gave the plaintiff the assistance that he should have received from the security guards in the first place. He could not function well enough to stand up on his own so the fireman summoned the EMTs. When the EMTs arrived they placed him on a gurney and at that point, the security guard (Sam-8) came out trying to get information from the plaintiff regarding his identity and race in order to formalize a report on an incident so the plaintiff could be blamed for the incident. The guard citing Mr. Tajalle stated that he would be barred from the library for fourteen days initially. As Mr. Tajalle was taken by gurney up to the third floor, the one guard was laughing and was addressing some thing to the plaintiff in a very unseemly manner.

Prior to this incident, the plaintiff never had any problems with both the old library or the new one. When he eventually returned, other staff and security guards tell him that they could not understand why the plaintiff had been barred. In addition to the physical and emotional harm caused by the accident, the loss of the use of the library has circumvented the plaintiff's efforts in pursuit of information on his patents and other productive projects that he initiated in the old library. The incident also interfered with his travel plans overseas because he felt he could not

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travel due to the need for medical treatment. Even now, when he visits the library, he suffers a high degree of anxiety and stress due to the fear of having a similar incident happen again.

## ARGUMENT

### 1. THE DEFENDANTS ARE NOT ENTITLED TO DISMISSAL UNDER FRCP 56 FOR THE PLAINTIFFS FIRST AMENDMENT CLAIMS.

The facts as articulated by Mr.Tajale indicates that the security officers retaliated against the plaintiff for exercising his first amendment right to criticize the guards for their inappropriate behavior. In **Houston v. Hill**, 482 U.S. 451 (1987) the U.S. Supreme Court ruled there was a constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. In that case the high court ruled the First Amendment recognizes, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive. As security guards they should have been aware of **Houston v. Hill** as established law. In that case the high court ruled that police officers should be trained to respond with restraint in the face of verbal challenges to police action which could even mean "fighting words" to other citizens. According to **Houston v. Hill**, this could include obscenities directed at the officers. Instead, the evidence now before the court demonstrates that the guards acted with retaliation and revenge for the challenge directed at him by the plaintiff which was mild under that standards given in **Houston v. Hill**. The right to sue for retaliation after confronting police officers has been established in **MacKinney v. Nielson** 69 F.3d 1002, 1007 (9th Cir 1995); see also **Duran v. City of Douglas**, 904 F.2d 1372, 1378 (9th Cir 1990). For these actions, the security guards are clearly not entitled to qualified immunity.

The defendants claim that they have the right to impose reasonable restraints on the right to speech in a library. This may be true, but under the version of events as articulated by the plaintiff, he did not violate these rules. Summary judgment in favor of the defendants on the first

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cause of action should be denied.

**2. THE DEFENDANTS ARE NOT ENTITLED TO DISMISSAL UNDER FRCP 12(B)(6) ON THE REMAINING CAUSES OF ACTION.**

The Supreme Court has cautioned that civil rights claims are to be subject only to normal standards of pleading. **Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit**, 113 S. Ct. 1160, 1163 (1993). The proper standard for assessing the adequacy of the instant complaint then is whether, accepting the factual allegations in the complaint as true, and construing these facts in the light most favorable to the plaintiff, the pleading shows any facts which could entitle plaintiff to relief. See, e.g., **Gooley v. Mobil Oil Corp.**, 851 F.2d 513, 514 (1st Cir. 1988)

Dismissal under Rule 12(b)(6) is appropriate only if, construing the plaintiffs allegations favorably, he "can prove no set of facts which would entitle him to relief." **Gibson v. United States**, 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987);. Furthermore, if matters outside the pleadings are presented to and not excluded by the district court, the court must treat a Rule 12(b)(6) motion as one for summary judgment, and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

Here the plaintiffs have submitted evidence outside the pleadings that if used to support their motion for dismissal for all causes of action pled, should be reviewed under the FRCP 56 standard. If the court disregards this evidence on the causes of action other than the first, there are sets of facts that entitle the plaintiff to relief.

The plaintiff agrees with defendant that the standards for seizure are laid out in **Terry v. Ohio**, 392 U.S. 1,1 19n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed. 2d 889 (1968). The plaintiff agrees that such restraints exist "only if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." **United States v.**

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**Mendenhall**, 446 U.S. 544, 100 S. Ct. 1870, 1877, 64 L.Ed. 2d 497 (1980). Here the only way the plaintiff, as a disabled person, would have been free to leave, would have been if he was allowed to use the handicapped entrance. Instead, he was ordered into a confined space that presented a high degree of danger and in fact, led to an injury. For this, his freedom of movement was restrained, just as surely as if police officers had slapped on handcuffs.

The defendants then go on to claim that excessive use of force must “shock the conscience.” The question in all cases is whether the use of force was "objectively reasonable in light of the facts and circumstances confronting" the officers. **Graham v. Connor**, 490 U.S. 386, 397. To determine whether a specific use of force was reasonable, the court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." **Id.** at 396 (internal quotation marks omitted). Relevant factors to this inquiry include, but are not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." **Id.**; see also **Forrester v. City of San Diego**, 25 F.3d 804, 806 n.2 (9th Cir. 1994). When appropriate, the reasonableness determination must also make "allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." **Graham**, 490 U.S. at 396-97. Here, there is nothing alleged in the complaint nor even in the officers own declarations that indicates that the plaintiff presented a danger to anyone. He was complying, not resisting arrest or attempting to evade arrest. To order a disabled person through a revolving door without even asking the nature of the disability first does shock the conscience.[1]

[1] The defendants try to impose an 8th circuit case on the plaintiff where a teacher dragged a rowdy student out of school, banging his head on a pole. But the student in that case was not disabled and the plaintiff in the case at bar was not rowdy.

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The Due Process Clause protects interests in life, liberty, and property. **Cleveland Bd. of Educ. v. Loudermill**, 470 U.S. 532, 538 n.3, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). The defendants concede that free access to a public library is a protected liberty interest.

"Once it is determined that the Due Process Clause applies, 'the question remains what process is due.'" **Loudermill**, 470 U.S. at 541 (quoting **Morrissey v. Brewer**, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)). "To determine what process is due, we must balance the risk of an erroneous deprivation, the state's interest in providing specific procedures and the strength of the individual's interest." **United States v. Crozier**, 777 F.2d 1376, 1383 (9th Cir. 1985);

There are two places where the plaintiff was denied due process. The defendants only address one, that of being excluded from the library. With respect to this, the defendants ask the court to apply the standards given in **Cassim v. Bowen**, 824 F.2d 791, 797. But **Cassim** was about a doctor who was accused of performing unnecessary high risk operations on patients. In that case the risk of injury to the public was high, and the issues to be determined were difficult, involving complex medical questions which might require expert witnesses. Here the risk posed by a pre-deprivation hearing were low. At most the risk to the public was a minor inconvenience. However, a predeprivation hearing would have been simple to conduct and much more accurate, due the ready availability of witnesses to both the officers and the plaintiff. Here, the plaintiff's interests were extremely high. He was denied the right to educate himself. Even if won a post deprivation hearing, he could have been denied access to the library for several weeks.

Also, the defendants do not address the second place where the plaintiff was denied due process. That was where the plaintiff was ordered through the revolving door instead of the regular door without due process. There was absolutely no risk to the public by allowing the plaintiff to exit through the handicap door instead of the regular door. Of course there was an

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exceedingly high risk to the plaintiff of requiring him to go through the revolving door. Since he was, by all accounts, complying with the officers order at the time he was leaving the building, there was no reason a pre-deprivation hearing could not have been held, if the officers felt there was some logical reason why he should be forced through the revolving door.

As for the municipal liability, the defendants only assert that there are no municipal liability because there is no 1983 liability to the individual defendants. But as argued above there is individual liability. Therefore the plaintiff should be allowed to continue with discovery in order to prove his municipal claims.

**3. IN THE ALTERNATIVE, THE PLAINTIFF SHOULD BE ALLOWED A FRCP 56(F) CONTIUNANCE IN ORDER TO PROVE HIS CLAIMS.**

In defending his claim, the plaintiff has had to resort to a certain amount of hearsay in order to establish his defense. If the court decides this is unacceptable, he should be allowed a continuance to depose doctors to prove his disability, or depose the Fireman in order to establish what they did at the time of the incident. He should also be allowed to conduct discovery to determine the identity of other staff who may have witnessed the event.

## CONCLUSION

For the reasons given above, the defendants request to dismiss this action should be denied.

Respectfully submitted this 4th day of February, 2008,

/S/____________________________
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